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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 52

ARCH R. EVERSON,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, *et al.*,

Appellees.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE

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MAY IT PLEASE THE COURT:

The undersigned, as Attorney-General of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae.*

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SUPREME COURT OF THE UNITED STATES

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ARCH R. EVERSON,

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Appellees.

BRIEF OF THE STATE OF NEW YORK AS AMICUS CURIAE

Statement

The appellant has appealed to this Court pursuant to the provisions of Section 237 (a) of the Judicial Code (28 U. S. C. § 344 [a]), from the New Jersey Court of Errors and Appeals. That Court upheld the constitutionality of Chapter 191 of the Laws of 1941 of the State of New Jersey and the resolution of appellee, Board of Education (133 N. J. L. 350). Appellant attacks the statute and resolution as infringing the Fourteenth Amendment of the Constitution of the United States.

The statute and resolution result in providing free transportation of children at the expense of the home municipality and of the state school fund to and from any school, including a school other than a public school which is not operated for profit.

The New Jersey statutory provision is fully quoted in appellant's brief (pp. 2-3) and, therefore, is not reproduced here. For like reason, further factual details relating to the specific litigation as it arose in New Jersey are not set forth here.

This brief is being filed by the State of New York as *amicus curiae* in accordance with the provisions of Rule 27 (9) of the Rules of this Court, in support of the constitutionality of the challenged statute.

Constitutional and Statutory Provisions in New York State

The Constitution of the State of New York authorizes the Legislature of the State to provide for the transportation of children to and from *any* school. This provision was added to the New York State Constitution in 1938. It was adopted by the New York State Constitutional Convention and approved by vote of the people in that year. It is as follows:

> "Art. XI, § 4. [Use of public property or money in aid of denominational schools prohibited; transportation of children authorized.]
>
> Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, *but the legislature may provide for the transportation of children to and from any school or institution of learning.*" (Provision added in 1938 is emphasized.)

Education Law § 206, subd. 18, accordingly provides:

> "18. Whenever any district shall have contracted with the school authorities of any city, or with another

school district, for the education therein of the pupils residing in such school district, *or whenever in any school district pupils of school age shall reside so remote from the school house therein or the elementary or high school they legally attend,* within or without the district, that they are practically deprived of school advantages during any portion of the school year, the inhabitants of the district entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of pupils residing therein, (a) to the elementary or high schools, or both, maintained in such district and/or (b) to the elementary or high schools, or both, in any city or district which an education contract shall have been made, and/or (c) to the elementary or high schools, or both, other than public, situated within the district or an adjacent district or city.

"The trustee or trustees or board of education of the district may contract with any person, corporation or other school district for such conveyance, when so authorized, in accordance with such rules and regulations as they or it may establish, consistent with rules and regulations of the commissioner of education. The trustees or board when so authorized by vote of the inhabitants of the district entitled to vote, also may purchase and maintain a motor vehicle or vehicles to be used for such conveyance." (Emphasis supplied.)

Education Law § 503 also provides:

"§ 503. Transportation

1. In providing or granting transportation for children pursuant to the provisions of this chapter, *sufficient transportation facilities* (including the operation and maintenance of motor vehicles) *shall be provided for all the children residing within the school district to and from the school they legally attend,* who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children.

2. When the voters, school trustees, or a board of education fail to provide the transportation authorized by this chapter, the parent or guardian of a child or any taxpayer residing in the school district, may

appeal to the commissioner of education, as provided in section eight hundred ninety of this chapter.

* * * * *

4. * * * In defraying any expense incurred in providing transportation of any pupils or children under any provision of this chapter, public moneys apportioned to the district in which such pupils or children reside may be used therefor." (Emphasis supplied.)

Argument

1. A state may properly furnish bus transportation of children to schools both public and non-public, and in furnishing such transportation the Fourteenth Amendment is not violated.
2. More direct contact between the state and the non-public school than transportation of the pupils has been held valid by this Court (*Cochran* v. *Board of Education*, 281 U. S. 370).
3. *Judd* v. *Board of Education*, 278 N. Y. 200, was decided under the New York State Constitution prior to the 1938 amendment. This Amendment eliminates the ground for that decision.

POINT I.

A state may properly furnish bus transportation of children to schools both public and non-public, and in furnishing such transportation the Fourteenth Amendment is not violated.

Broadly speaking, the basis of attack upon the New Jersey statute is that it constitutes the taking of private property for a private purpose, and is, moreover, in aid of sectarian schools, constituting legislation respecting the establishment of religion.

Furnishing transportation to take children to schools is neither the use of public moneys for private purposes, nor does it constitute aid to the establishment of religion.

Compulsory education is one of the basic concepts of the American way of life. It is encouraged and supported by the people. The free American, however, also cherishes his right to have a voice in the education of his child, and to that end, to choose the type of school which his child shall attend. Many prefer the denominational school instead of the public school. Indeed, this Court has held that a state may not pass a law compelling attendance of children at a public school (*Pierce* v. *Society of Sisters*, 268 U. S. 510). There, this Court said (534-35):

> "* * * we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The sectarian school is thus recognized as legally equivalent to the public school system so far as compulsory attendance is concerned (Encyclopaedia of Social Sciences, Education, Vol. V, p. 422). The children of this country, to the extent of at least ten per cent, attend sectarian schools. It has been said that the same spirit of democracy which nutured public education in this country, has inspired the development of the sectarian school. The elimination of any religious instruction from schools in this democracy has caused parents, who prefer that their children receive instruction of this nature, to maintain the

sectarian school. "The recognition of sectarian education by the state is based ultimately upon its recognition of the primacy of family claims." (Encyclopaedia of Social Sciences, pp. 423-24).

Recognizing the sectarian school as a significant unit in a universal education system, the state cannot divest itself of all connection with it. To do so would be to defeat its own purpose and to exclude from the benefits and from the teachings fundamental in American education those children who do not attend the public schools. The state would be obliged to keep rigidly aloof and have no part in the operation of the sectarian school. Lest this be so, and that education in such schools be comparable to that received in public schools, there must be cooperation between the state and the sectarian schools. Every instance of such cooperation is, to be sure, in a sense "aid" to the denominational school, but every such instance is not forbidden aid. The approach must be realistic. The proper and desirable activities of the state in the interest of education and in the interest of the health and welfare of its children cannot be withheld from some of the children because they attend a denominational school:

> "Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place, outside of public aid or support. * * * The separation of the public school system from religious denominational instruction is thus complete." *(People ex rel. Lewis* v. *Graves,* 245 N. Y. 195, 198-99.)

As education has grown in this country and as government has increased its activities in the interest of the health and welfare of its people and of its children, it has brought within the sphere of its aid and control the denominational as well as the public school.

For example, in the State of New York parochial schools are chartered by the Board of Regents (Education Law § 59). There is regular inspection by the Board of Regents of the non-public as well as the public school (New York State Constitution, Art. XI, § 4; Education Law § 94 [2]). The sectarian school is not subject to taxation (New York State Constitution, Art. XVI, § 1; Tax Law § 4 [6]). Attendance in the non-public school complies with the Compulsory Education Law (Education Law, Art. 23) and satisfies the requirements for part-time attendance (Education Law § 601). Terms of attendance in the non-public as well as the public school are prescribed (Education Law §§ 620-621), and certain curriculum requirements are made (Education Law §§ 620; 695; 705-9; 720; 730; 735-6).

These are all aspects of the inclusion of the denominational school in the universal education program. Some of them have the semblance of aid to the denominational school; others of discipline of the school. If the divorce of the State from the denominational school must be total, the State could not extend the provisions of any of these statutes to it. The principle of separation of church and state must ever remain inviolate in these United States. It has so remained although the several states, under the police power, have legislated in a variety of respects* for the welfare of children in the denominational as well as in the public school. The transportation of pupils by buses to such schools does not spell danger to that principle though philosophically theoretical arguments may be spun showing a benefit to the denominational school to which the child is delivered by bus.

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* "The State and Sectarian Education," National Education Association Research Bulletin, February 1946, pp. 36, 42.

The carrying of children to schools by buses in certain areas throughout the country, particularly the rural and semi-urban, has become almost universal in this automobile age.** The day when the country child trudged miles to school on foot is gone. In this day, when speeding automobiles and trucks race along the way that the child takes to school, to make the way a deathtrap, is the child attending a denominational school to be set on foot on those highways while a child attending the public school is kept safe by the state which is aware that, in the interests of the child's health, welfare and very life, it must carry him to school by bus? Does this act of the state, to preserve its children alive, break down the separation of church and state, because the child it carries enters the denominational school, rather than the public school, when it alights from the bus?

POINT II

More direct contact between the state and the non-public school than transportation of the pupils has been held valid by this Court (Cochran v. Board of Education, 281 U. S. 370).

The *Cochran* case involved a Louisiana statute under which school books were to be supplied to all school children of the state. One of the grounds upon which the statute was attacked was that it violated the Fourteenth Amendment of the Federal Constitution (281 U. S. 370, at p. 373). This Court held that it did not.

** Statistics have been compiled indicating that in 1945, 4,700,000 children in the United States were carried to schools daily in buses. ("Bus Transportation" [Annual Review and Statistical Number] January 1946, p. 69.) See also "Major Developments in the Transportation of Pupils," The American School and University, 1940, p. 551.

The basis of attack, in the words of Chief Justice Hughes, was (p. 374):

> "The contention of the appellant under the Fourteenth Amendment is that taxation for the purchase of school books constituted a taking of private property for a private purpose. *Loan Association* v. *Topeka*, 20 Wall. 655. The purpose is said to be to aid private, religious, sectarian, and other schools not embraced in the public educational system of the State by furnishing text-books free to the children attending such private schools."

Affirming the judgment of the Louisiana Supreme Court which had upheld the statute, Chief Justice Hughes quoted that portion of its opinion which noted that some of the children receiving the books did not attend public schools (281 U. S. at pp. 374-5):

> "'The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.'"

The Chief Justice concluded (281 U. S. at p. 375):

> "Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."

If supplying books to children attending other than public schools is not violative of the Fourteenth Amendment as being aid to such schools, it appears to remove from the realm of argument a contention that the mere transportation of the children to such schools would come within the prohibited taking of private property for a private, as distinguished from the valid public purpose. The relation to the school of the act of transporting the children to it is distinctly more remote than the supplying of books from which the children receive instruction within the very walls of the school. Yet the latter is clearly proper and even imperative if the sectarian school is part of our education system (*supra*, Point I).

POINT III

Judd v. Board of Education, 278 N. Y. 200, was decided under the New York State Constitution prior to the 1938 amendment. This amendment eliminates the ground for that decision.

Prior to November 1938, the specific provision that the "legislature may provide for the transportation of children to and from any school or institution of learning" did not appear in what is now Article XI, Section 4 of the Constitution of the State of New York.

The Court of Appeals in a four to three decision in *Judd v. Board of Education*, 278 N. Y. 200, held under the then existing constitutional provision that free transportation of children to denominational schools was "aid furnished 'indirectly' to such schools" (278 N. Y. 200, 212). The decision reversed the lower courts which had held free transportation permissible even under the constitutional provision as it then was. There was a strong dissenting opin-

ion by Chief Justice Crane in which two other members of the Court concurred.

Now that the permissive provision for bus transportation has been added to the constitutional provision construed in the *Judd* case, and any violation of the New York Constitution is not in question, it is important to note that the Court of Appeals said of the *Cochran* case (278 N. Y. at pp. 213-214):

> "The question of the constitutionality of the act authorizing the appropriation of public funds for the purpose indicated under the Louisiana Constitution was not a Federal question, and the only question involved or decided in the Supreme Court was whether or not the act in question authorized the taking of private property for a private purpose and was thus violative of the provisions of the Fourteenth Amendment to the Federal Constitution."

So rigid is the general provision of the New York Constitution that public property or money may not be used even "indirectly" in aid of denominational schools, that the provision permitting examination or inspection of such schools is specifically set forth as an exception (Art. XI, § 4; Documents of 1894 Constitutional Convention, No. 62). Under the constitutional provision so stringent, bus transportation was held in the *Judd* case to be a form of prohibited "indirect" aid. The further exception was then added in 1938 to the constitutional restriction making provision for such transportation permissible and is in the New York Constitution now.

Conclusion

Bus transportation of children to schools is, in this motor age, a necessary activity by the state to promote the health, safety and welfare of its children. Accordingly, it is not a

use of public moneys for private purposes. It is not use for the benefit of the school which the child attends after it leaves the bus which has carried it, whether such school be the public school or a denominational school.

The constitutionality of the New Jersey statute here challenged should be sustained.

October 17, 1946.

Respectfully submitted,

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